

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR PARTS 229 and 230**

**[RELEASE NOS. 33-8591A; 34-52056A; IC-26993A; FR-75A**

**INTERNATIONAL SERIES RELEASE NO. 1294A]**

**FILE NO. S7-38-04**

**RIN 3235-AI11**

**SECURITIES OFFERING REFORM; CORRECTION**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule; technical amendments.

**SUMMARY:** We are making technical corrections to rules adopted in Release No. 33-8591 (July 19, 2005), which were published in the Federal Register on August 3, 2005 (70 FR 44722). The adopted rules modify and advance significantly the registration, communications, and offering processes under the Securities Act of 1933. This document corrects certain errors in the regulatory text of the adopting release and otherwise clarifies certain of the rules.

**EFFECTIVE DATE:** February 13, 2006.

**FOR FURTHER INFORMATION CONTACT:** Amy M. Starr at (202) 551-3200, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549.

**SUPPLEMENTARY INFORMATION:** We are amending Item 512<sup>1</sup> of Regulation S-K,<sup>2</sup> and Rules 139,<sup>3</sup> 405,<sup>4</sup> and 433<sup>5</sup> under the Securities Act.<sup>6</sup>

**I. Discussion of Corrections**

**A. Rule 139(a)(1)(i) – Issuer-specific research reports**

The amendments to Rule 139 provided that the eligibility determination for purposes of a broker’s or dealer’s reliance on the safe harbor for issuer-specific research reports could be determined at the time an issuer filed its Form S-3 or Form F-3 and the time of each annual Securities Act Section 10(a)(3) update to such a registration statement. The amendment was intended to provide an approximately-annual evaluation of an issuer’s status for purposes of Rule 139 that would provide greater certainty to brokers and dealers relying on the safe harbor for issuer specific research reports. Because it was our intent that the safe harbor continue to be available where an issuer proposes to file a registration statement, it was inconsistent for the amendment to condition the safe harbor eligibility determination on a Form S-3 or Form F-3 actually being on file. Indeed, the availability of the safe harbor even if an issuer has not yet filed its Form S-3 or Form F-3 is clear from the rule text comprising the preamble to Rule 139(a), which states:

Under the conditions of paragraph (a)(1) or (a)(2) of this section, a broker’s or dealer’s publication or distribution of a research report about

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<sup>1</sup> 17 CFR 229.512.

<sup>2</sup> 17 CFR 229.10 et seq.

<sup>3</sup> 17 CFR 230.139.

<sup>4</sup> 17 CFR 230.405.

<sup>5</sup> 17 CFR 230.433.

an issuer or any of its securities shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer to sell a security that is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, even if the broker dealer is participating or will participate in the registered offering of the issuer's securities.... (emphasis added)

Further, a filed registration statement on Form S-3 or Form F-3 was not required under the pre-amendment provisions of Rule 139. Accordingly, we are amending Rule 139(a)(1)(i)(A)(1) to state explicitly that if a Form S-3 or Form F-3 is not on file, the broker or dealer could rely on the safe harbor if, at the time of reliance on the rule, the issuer meets the registrant requirements of Form S-3 or Form F-3 and either:

- the issuer is eligible to register a primary offering of securities on Form S-3 or Form F-3 based on the \$75 million minimum public float eligibility provision of those forms; or
- the issuer proposes to register an offering of the issuer's securities in reliance on General Instruction I.B.2 of Form S-3 or Form F-3.

In addition, the safe harbor for issuer-specific reports in Rule 139 also was meant to cover all equity and debt securities of well-known seasoned issuers, whether or not investment grade, that may be registered on an automatic shelf registration statement, consistent with our belief that well-known seasoned issuers are the most widely followed in the marketplace. However, the reference in the rule to only primary offerings meeting the transactional requirements of General Instruction I.B.1 or I.B.2 of Form S-3 or Form

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<sup>6</sup> 15 U.S.C. 77a et seq.

F-3 mistakenly excluded certain securities that may be registered by well-known seasoned issuers on Form S-3 or Form F-3 under automatic shelf registration statements pursuant to General Instruction I.D, such as non-investment grade securities. We are, therefore, amending Rule 139(a)(1) to provide that a broker or dealer can rely on the safe harbor if the issuer is a well-known seasoned issuer. The only exception to this provision is for a majority-owned subsidiary that is not eligible on its own as a well-known seasoned issuer and registers its securities on its parent well-known seasoned issuer's registration statement.

**B. Rule 405 – Definition of Well-Known Seasoned Issuer**

In the definition of well-known seasoned issuer, paragraph (1)(i)(B)(3) contains a typographical error – the paragraph contains a cross reference to paragraph (1)(i)(B)(2) that should be a cross reference to paragraph (1)(i)(B)(1). We are correcting that typographical error in this release.

**C. Rule 433(f) – Free writing prospectuses published or distributed by media**

New Rule 433(f) includes certain accommodations where a free writing prospectus is prepared and published or broadcast by persons in the media business that are unaffiliated with the issuer and any other offering participant, and the preparation, publication, or broadcast is not paid for by the issuer or other offering participant. Where the conditions of Rule 433(f) are met, an issuer or offering participant is not required to have a statutory prospectus precede or accompany the media communication. However, a filed registration statement including a statutory prospectus is necessary.

In adopting Rule 433, we stated that the purpose of the media free writing prospectus provision in paragraph (f) is to permit unaffiliated, uncompensated media

publications to be published or distributed while an issuer is in registration, without requiring that the statutory prospectus precede or accompany the media publication, so long as the statutory prospectus is on file. Under Rule 433(f), it was our intent that the media publication accommodations be available without regard to whether the statutory prospectus in an initial public offering includes a bona fide price range.<sup>7</sup>

However, Rule 433 inadvertently can be read elsewhere to narrow the availability of the media exclusion for initial public offerings, as Rule 433(b)(2)(ii) requires that a statutory prospectus be on file, which in the context of an initial public offering requires a price range. To address this situation, we are amending paragraph (b)(2)(ii) of Rule 433 to provide that the media accommodations in Rule 433(f) do not require that the filed prospectus, in the context of an initial public offering, include a price range. This change will clarify that the media accommodations included in paragraph (f) of Rule 433 are not limited for initial public offerings.

**D. Item 512(h) of Regulation S-K – Inclusion of statement of Commission’s position on indemnification for liabilities in automatic shelf registration statements**

Item 512(h) of Regulation S-K requires an issuer to include a statement regarding the Commission’s position on indemnification for liabilities under the Securities Act in

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<sup>7</sup> Indeed, in the adopting release (Securities Offering Reform, Release No. 33-8591 [70 FR 44722](Aug. 3, 2005)), we provided an example of a chief executive officer of a non-reporting issuer giving an interview to a financial news magazine without payment. We included this example to make clear that the accommodation for unaffiliated, uncompensated media publications was available to issuers in initial public offerings. Providing that the unaffiliated, uncompensated media accommodation for issuer and underwriter free writing prospectuses is available in an initial public offering only after the prospectus includes a bona fide price range would, we believe, significantly and unintentionally limit the availability of the media accommodation in initial public offerings to a potentially brief time period between the inclusion of a bona fide

registration statements in which acceleration is requested or in registration statements filed on Form S-8. We did not intend to alter the application of Item 512(h) of Regulation S-K; however, we did not amend Item 512(h) of Regulation S-K to include a reference to immediately effective automatic shelf registration statements under amended Rule 462. Absent the corrections we are making today, the amendments to Rule 462 providing that automatic shelf registration statements go effective immediately would inadvertently allow a well-known seasoned issuer to file an automatic shelf registration statement without including a statement of the Commission's position on indemnification in its undertakings. The omission of such language was an oversight, as it would otherwise be inconsistent with our long-standing rules to include such statements.

Accordingly, we are correcting this omission under Item 512(h) of Regulation S-K with regard to automatic shelf registration statements and post-effective amendments to automatic shelf registration statements that go effective immediately pursuant to Rule 462(e) and (f). The amendments we are adopting provide for the inclusion of new language in Item 512(h) of Regulation S-K stating that the Item will apply to registration statements that go effective immediately pursuant to Rule 462 (e) and (f).

## **II. Certain Findings**

Under the Administrative Procedure Act, a notice of proposed rulemaking is not required when an agency, for good cause, finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>8</sup> The correcting amendments to Item 512 of Regulation S-K, and Rules 139, 405, and 433 under the Securities Act are technical changes that conform the text to the intent of the Commission

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price range in the prospectus and the effective date of the registration statement.

and correct a cross-reference. For these reasons, the Commission finds that there is no need to publish notice of these amendments.<sup>9</sup>

The Administrative Procedures Act also requires publication of a rule at least 30 days before its effective date unless the agency finds otherwise for good cause.<sup>10</sup> For the same reasons described with respect to opportunity for notice and comment, the Commission finds there is good cause for the amendments to take effect on [insert date of publication in the Federal Register].

### **III. TEXT OF AMENDMENTS**

#### **List of Subjects in CFR Parts 229 and 230**

##### 17 CFR Parts 229 and 230

Reporting and recordkeeping requirements, Securities.

Accordingly, 17 CFR parts 229 and 230 are corrected by making the following amendments:

#### **PART 229 – STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 – REGULATION S-K**

1. The authority citation for part 229 continues to read in part as follows:

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<sup>8</sup> 5 U.S.C. 553(b)(3)(B).

<sup>9</sup> For similar reasons, the amendments do not require an analysis under the Regulatory Flexibility Act or analysis of major status under the Small Business Regulatory Enforcement Fairness Act. See 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analyses, the term “rule” means any rule for which the agency publishes a general notice of proposed rulemaking) and 5 U.S.C. 804(3)(C) (for purposes of congressional review of agency rulemaking, the term “rule” does not include any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties).

<sup>10</sup> See 5 U.S.C. 553(d)(3).

**Authority:** 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 79e, 79j, 79n, 79t, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

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2. Amend §229.512 to revise the introductory text of paragraph (h) to read as follows:

**§229.512 (Item 512) Undertakings.**

\* \* \* \* \*

(h) Request for acceleration of effective date or filing of registration statement becoming effective upon filing. Include the following if acceleration is requested of the effective date of the registration statement pursuant to Rule 461 under the Securities Act (§230.461 of this chapter), if a Form S-3 or Form F-3 will become effective upon filing with the Commission pursuant to Rule 462 (e) or (f) under the Securities Act (§230.462 (e) or (f)), or if the registration statement is filed on Form S-8, and:

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**PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

3. The authority citation for part 230 continues to read in part as follows:

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 79t, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

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4. Amend §230.139 to revise paragraph (a)(1)(i)(A)(1) to read as follows:

**§230.139 Publications or distributions of research reports by brokers or dealers distributing securities.**

(a) \* \* \*

(1) \* \* \*

(i) \* \* \*

(A)(1) At the later of the time of filing its most recent Form S-3 (§239.13 of this chapter) or Form F-3 (§239.33 of this chapter) or the time of its most recent amendment to such registration statement for purposes of complying with section 10(a)(3) of the Act or, if no Form S-3 or Form F-3 has been filed, at the date of reliance on this section, meets the registrant requirements of such Form S-3 or Form F-3 and:

(i) At such date, meets the minimum float provisions of General Instruction I.B.1 of such Forms; or

(ii) At the date of reliance on this section, is, or if a registration statement has not been filed, will be, offering securities meeting the requirements for the offering of investment grade securities pursuant to General Instruction I.B.2 of Form S-3 or Form F-3; or

(iii) At the date of reliance on this section is a well-known seasoned issuer as defined in Rule 405 (§230.405), other than a majority-owned subsidiary that is a well-known seasoned issuer by virtue of paragraph (1)(ii) of the definition of well-known seasoned issuer in Rule 405; and

\* \* \* \* \*

5. Amend §230.405, definition of “Well-known seasoned issuer”, paragraph (1)(i)(B)(3) to revise the cite “paragraph (1)(i)(B)(2)” to read “paragraph (1)(i)(B)(1)”.

6. Amend §230.433 by adding a sentence to the end of paragraph (b)(2)(ii) to read as follows:

**§230.433 Conditions to permissible post-filing free writing prospectuses.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) \* \* \* For purposes of paragraph (f) of this section, the prospectus included in the registration statement relating to the offering that has been filed does not have to include a price range otherwise required by rule.

\* \* \* \* \*

By the Commission.

Nancy M. Morris  
Secretary

Date: February 6, 2006